91-1375

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER, 1991 TERM

No. _____

CHARLES J. GOLDBLUM,

Petitioner,

v.

THOMAS A. FULCOMER, and the
ATTORNEY GENERAL OF THE
COMMONWEALTH OF PENNSYLVANIA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER THE ADMISSION OF THE OUT-OF-COURT DECLARATIONS OF THE DECEASED VICTIM WITH RESPECT TO PETITIONER'S ALLEGED INVOLVEMENT IN A LAND FRAUD SCHEME AND WITH RESPECT TO THE VICTIM'S ALLEGED PARTICIPATION IN AN ARSON VIOLATED PETITIONER'S CONSTITUTIONAL RIGHTS TO CONFRONTATION AND CROSS-EXAMINATION GUARANTEED BY THE 6TH AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION?

II.

WHETHER THE DENIAL OF PETITIONER'S PRETRIAL APPLICATION FOR PSYCHIATRIC EXAMINATION OF THE PROSECUTION'S ONLY EYEWITNESS COUPLED WITH THE DENIAL OF PETITIONER'S MOTION FOR A NEW TRIAL BASED ON AFTER DISCOVERED EVIDENCE SHOWING A SUBSTANTIAL MEDICAL BASIS FOR ATTACKING THE CREDIBILITY OF THAT WITNESS TOGETHER DENIED PETITIONER DUE PROCESS UNDER THE 14TH AMENDMENT OF THE U.S. CONSTITUTION?

TABLE OF CONTENTS

Questions Presented for Review i

Table of Authorities iii

Opinions and Orders Below 1

Statement of Jurisdiction 1

Constitutional Provisions Involved 2

Statement of the Case 2

Reasons for Granting the Writ 21

Conclusion 30

Contents of Appendix:

Magistrate's Report and Recommendation, dated August 31, 1990 ..... 1a

Order and Opinion of the United States District Court for the Western District of Pennsylvania, dated October 31, 1990 ..... 24a

Judgment Order of the United States Court of Appeals for the Third Circuit, dated November 26, 1991 ..... 30a

TABLE OF AUTHORITIES

Cases

Berger v. California, 393 U.S. 314 (1969) 28

Boliek v. Missouri, 479 U.S. 903 (1986) 24

Chambers v. Mississippi, 410 U.S. 284 (1973) 26-29

Commonwealth v. Bond, 17 Mass. App. 396,
458 N.E.2d 1198 (1984) 23

Commonwealth v. Goldblum,
126 P.L.J. 227 (C.P. Allegheny Cnty. 1978) 3

Commonwealth v. Goldblum,
287 Pa. Super. 544, 427 A.2d 258 (1980) 4

Commonwealth v. Goldblum,
498 Pa. 455, 447 A.2d 234 (1982) 4

Davis v. Alaska, 415 U.S. 308 (1974) 29

Dutton v. Evans, 400 U.S. 74 (1970) 24

Hughes v. Matthews, 576 F.2d 1250 (7th Cir. 1978) 29

Kennedy v. State, 385 So.2d 1020 (Fla. App. 1980) 23

McMorris v. Israel, 643 F.2d 458 (7th Cir. 1981) 29

Ohio v. Roberts, 448 U.S. 63 (1980) 22

People v. Huber, 131 Ill. App. 3d 163, 86 Ill. Dec. 385,
475 N.E.2d 509 (1985) 23

People v. Ireland, 70 Cal.2d 522, 75 Cal. Rptr. 188, 450 P.2d 580 (1969) 23

People v. Madson, 638 P.2d 18 (Colo. 1981) 23

Rivera v. Dept. of Corrections, 915 F.2d 280 (7th Cir. 1990) 29

Shepard v. United States, 290 U.S. 96 (1933) 21-22

State v. Goodrich, 97 Idaho 472, 546 P.2d 1180 (1976) 23

State v. Kump, 76 Wyo. 273, 301 P.2d 808 (1956) 23

State v. Wauneka, 560 P.2d 1377 (Utah 1977) 23

United States v. Brown, 160 U.S. App. D.C. 190, 490 F.2d 758 (1974) 23

United States v. Pizarro, 717 F.2d 336 (7th Cir. 1983) 29

Rules

F.R.Evid. 803(3) 22-23

OPINIONS AND ORDERS BELOW

The Report and Recommendation of the United States Magistrate of the United States District Court for the Western District of Pennsylvania is set forth in the Appendix at 1a.

The Order and Opinion of the United States District Court for the Western District of Pennsylvania is set forth in the Appendix at 24a.

The Judgment Order of the United States Court of Appeals for the Third Circuit is set forth in the Appendix at 30a.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Third Circuit entered the judgment sought to be reviewed on November 26, 1991. Subject matter jurisdiction of the United States District Court for the Western District of Pennsylvania was invoked under 28 U.S.C. § 2254. The jurisdiction of the United States Court of Appeals for the Third Circuit was invoked under 28 U.S.C. § 2253.

Title 28, United States Code, § 1254(1) confers jurisdiction on this Court to review the final judgment of the United States Court of Appeals for the Third Circuit by writ of certiorari. Pursuant to Rule 20.4 and 29.1 of the Supreme Court of the United States, the time for filing a petition for writ of certiorari began to run on November 26, 1991 and expires on February 24, 1992.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Sixth Amendment:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for the obtaining of witnesses in his favor, and to have the assistance of counsel for his defense.

United States Constitution, Fourteenth Amendment, Section 1:

All persons born or naturalized in the United States, and subject to jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

(a) Nature of the Case in Brief.

Petitioner Charles J. Goldblum ("Goldblum") was charged by indictment in the Court of Common Pleas of Allegheny County, Pennsylvania on March 18, 1976 with the crimes of murder and voluntary manslaughter. The charges arose from the death in Pittsburgh of George Wilhelm on February 9, 1976. On May 27, 1976, Goldblum was also indicted for the crime of conspiracy to commit theft by deception. On August 16, 1976, Goldblum was further charged by information with the crimes of arson and criminal solicitation to commit arson.

Goldblum was tried on August 15, 1977. On August 30, 1977, the jury returned a verdict of guilty of first degree murder and a verdict of guilty on all other charges. The jury, after a separate penalty-phase hearing, returned a sentence of life imprisonment on the murder conviction.

Post-verdict motions were filed and subsequently denied on September 14, 1977. On October 3, 1977, the trial judge imposed the following sentences:

CC761267 - Murder (Life Imprisonment);

CCC7604826 - Arson (10-20 years, consecutive to life sentence);

CC7604830 - Criminal Solicitation (5-10 years, consecutive to life sentence and 10-20 year sentence for arson);

CC7603918 - Criminal Conspiracy (Suspended, but with restitution ordered.)

On October 24, 1977, Goldblum appealed to the

Superior Court of Pennsylvania from the judgments of sentence imposed on all charges except the murder conviction. The judgment of sentence on the murder conviction was appealed directly to the Supreme Court of Pennsylvania. On April 5, 1978, Goldblum requested that the Superior Court certify the appeal to the Supreme Court to be consolidated with the murder appeal. That request was granted. On July 12, 1979, the Supreme Court of Pennsylvania transferred jurisdiction over Goldblum's appeals to the Superior Court of Pennsylvania. On May 23, 1980, a special panel of the Superior Court entered an Order and Memorandum Opinion affirming all judgments of sentence except that entered at CC7603918, criminal conspiracy to commit theft by deception.

Goldblum petitioned the Supreme Court of Pennsylvania for allowance of appeal. The Commonwealth also petitioned for allowance of appeal. Both petitions were granted.

On November 21, 1980, Goldblum petitioned the Supreme Court of Pennsylvania for remand to resolve a claim that he was entitled to a new trial because of after-discovered evidence relating to the mental deficiencies of Clarence Miller, the Commonwealth's sole and principal eyewitness against Goldblum. Goldblum asserted that during the subsequent trial of Clarence Miller, two experts had testified that Miller was a brain-damaged individual with deficits in his ability to give accurate testimony. On January 19, 1981, the Supreme Court granted the remand petition.

The Court of Common Pleas of Allegheny County conducted two days of evidentiary hearings on January 28 and 29, 1982, at which time Goldblum produced the testimony of a psychiatrist and a clinical psychologist relating to the mental deficiencies of Clarence Miller. On May 3, 1982, the Court of Common Pleas denied the motion for new trial based on after-discovered evidence.

On July 2, 1982, the Supreme Court of Pennsylvania reversed the Superior Court's order vacating the conviction at CC7603918, and affirmed all judgments of sentence. Application for reconsideration was denied.

On March 7, 1986, Goldblum filed a petition in the Court of Common Pleas of Allegheny County, Pennsylvania pursuant to the Pennsylvania Post-Conviction Hearing Act (42 Pa.C.S. § 9541 et seq.). Goldblum asserted numerous grounds for relief in the petition. The trial court denied the petition without hearing on June 23, 1986.

Goldblum appealed from Judge O'Brien's decision to the Superior Court of Pennsylvania. The Superior Court by order and memorandum opinion dated February 2, 1988 affirmed the order denying the Petition for Post-Conviction Hearing Act relief. On March 3, 1988, Goldblum filed in the Supreme Court of Pennsylvania a Petition for Allowance of Appeal which was denied on July 27, 1988.

On July 14, 1989, Goldblum filed a Petition for Writ of Habeas Corpus in the United States District Court for the Western District of Pennsylvania pursuant to 28 U.S.C. § 2254. The Petition was docketed at Civil Action No. 89-1493 and assigned to the Honorable Ila Jeanne Sensenich, United States Magistrate. On August 31, 1989, a "Magistrate's Report and Recommendation" was filed (Sensenich, Mag.) recommending denial of a certificate of probable cause and dismissal of the Petition for Writ of Habeas Corpus. On September 10, 1990, Goldblum filed objections to the Magistrate's Report and Recommendation. On October 31, 1990, District Judge Gustave Diamond denied a certificate of probable cause and dismissed the Petition for Writ of Habeas Corpus.

On November 29, 1990, Goldblum filed a Notice of Appeal with the United States Court of Appeals for the Third Circuit. Simultaneously, Goldblum filed an Application for

Certificate of Probable Cause pursuant to 28 U.S.C. § 2253 and Rule 22(b) of the Federal Rules of Appellate Procedure. On May 31, 1991, the United States Court of Appeals for the Third Circuit granted Goldblum's application and a certificate of probable cause was issued.

On November 26, 1991, the United States Court of Appeals entered a judgment order affirming the judgment of the district court.

(b) Overview of the Facts.

An understanding of the factual background of this case requires an understanding of the three criminal transactions charged and the relationship of those transactions. The three separate transactions are: (1) the North Carolina land sale fraud; (2) the burning of the Fifth Avenue Inn; and (3) the murder of George Wilhelm.

(1) North Carolina Land Sale Fraud.

In the Summer of 1974, George Wilhelm of Pittsburgh was defrauded out of the sum of approximately $20,000. Wilhelm was made to believe that he could purchase certain U.S. Government land in North Carolina through the office of Senator Richard Schweiker, then U.S. Senator from Pennsylvania. For the purpose of deceiving Wilhelm into thinking he was dealing with federal officials, a member of the conspiracy named Ted Dedo pretended to be "Ken Manella," an administrative assistant to Senator Schweiker. Wilhelm paid money to Dedo, who was impersonating "Ken Manella," and in return received fake deeds to federal lands in North Carolina.

In Fall, 1974, Wilhelm visited the offices of Senator Schweiker and discovered that the "Ken Manella" with whom he had dealt and to whom he had given money was not the real Ken Manella. Senator Schweiker's office contacted the F.B.I

and, during the ensuing investigation, written statements were taken from Wilhelm and from his friend, Clarence Miller. Wilhelm claimed to have been defrauded. Miller, who had accompanied Wilhelm on the various land-purchasing trips, did not disclose his part in the fraud to the F.B.I.

In October, 1974, Wilhelm and Miller presented notarized statements to the F.B.I., claiming that they had been engaged in playing a political trick or hoax on Ken Manella of Senator Schweiker's office. The F.B.I. terminated the investigation.

The identity of members of the conspiracy to defraud Wilhelm was hotly contested at trial. It is undisputed that one member of the conspiracy to commit theft by deception was Clarence Miller, a longtime friend of George Wilhelm. Clarence Miller claimed there were three other participants: Ted Dedo, who played "Ken Manella;" one Fred Orlofsky; and Charles Goldblum. Neither Orlofsky or Dedo testified at trial in the case. The Commonwealth, in proving that Goldblum was a member of the conspiracy to defraud Wilhelm, relied, with one exception, on the testimony of Clarence Miller.[1]

(2) The Arson of the Fifth Avenue Inn.

In February, 1975, Goldblum purchased an existing restaurant and business in Pittsburgh known as the "Fifth Avenue Inn."

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[1] The only other Commonwealth evidence to support participation by Goldblum in the conspiracy to defraud Wilhelm (other than the testimony of Clarence Miller) was the testimony of William J. Hill, who testified to certain out-of-court statements made by George Wilhelm prior to his death on February 9, 1976. The testimony of Mr. Hill will be discussed infra.

On November 30, 1985, a fire destroyed the Fifth Avenue Inn. The Commonwealth contended that Goldblum had caused an arsonist to burn the building. Clarence Miller testified that Goldblum had first asked Miller and Fred Orlofsky to burn the building on November 30th. Miller claimed that when he and Orlofsky refused to do so, Goldblum stated that he would then ask George Wilhelm to set the fire. As was the case with the North Carolina land sale fraud, the Commonwealth's only witness to Goldblum's alleged participation in the fire was Clarence Miller.[2]

(3) The Murder of George Wilhelm.

On February 9, 1976 at 9:22 p.m., George Wilhelm was found fatally wounded on the roof of a walkway adjacent to a parking garage in Pittsburgh. While police were removing him from the scene, Wilhelm said: "Clarence -- Clarence Miller did this to me." Wilhelm died several hours later.

Police interviewed Clarence Miller, who admitted having met with Goldblum the evening before, admitted that the two of them then had met with Wilhelm, but stated that Miller and Goldblum had left Wilhelm at a McDonald's restaurant and knew nothing of how he had died. Police then interviewed Goldblum, who gave the same account with the exception that Miller and Goldblum's accounts differed on the place where they had met prior to seeing Wilhelm. Police returned to Clarence Miller and confronted him with the discrepancy. After

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[2] Clarence Miller was permitted to testify to alleged out-of-court statements made by George Wilhelm, who was deceased at the time of trial, with resect to Wilhelm's having been solicited to act as the arsonist, having acted as the arsonist, and having demanded payment. Miller gave no first-hand testimony concerning these events. Miller's testimony with respect to the out-of-court declarations of Wilhelm will be discussed infra.

fainting and being taken to South Side Hospital, Miller admitted being at the scene when Wilhelm was stabbed to death and claimed that Goldblum was the assailant.

At the Coroner's inquest held on February 18, 1976, Miller testified that on February 9, 1976, immediately prior to the killing, Goldblum and Wilhelm had been arguing; specifically, Wilhelm claimed Goldblum owed him money. Miller testified that he did not know the basis for Wilhelm's claim. Miller also testified at the inquest that the first occasion on which Goldblum had met Wilhelm was election eve, November, 1974.[3]

On March 2, 1976, Miller gave police a statement in which he claimed that Wilhelm had burned down the Fifth Avenue Inn on November 30, 1975 at Goldblum's request, that Goldblum had promised to pay Wilhelm for doing so but had been unable to do so because the insurer had questioned the origin of the fire, and that Wilhelm had been threatening to go to the authorities.

On April 2, 1976, when questioned by police about the land fraud transaction in North Carolina, Miller gave a statement in which he admitted his part in the transaction and claimed that Goldblum had been a participant.

(c) Statement of Material Facts.

(1) The Evidence of Clarence Miller's Mental Deficiencies.

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[3] The trial testimony of Miller and William Hill (discussed infra) with respect to Goldblum's alleged participation in the land fraud transaction is thus contrary to Miller's inquest testimony.

Prior to trial, the Commonwealth filed an application to have a Commonwealth-appointed psychiatrist examine Goldblum. The trial court granted the application on April 6, 1976 on the basis that such evaluation and examination "may be helpful in the prosecution of the within-captioned action..." Defense counsel, having obtained by subpoena the file of Clarence Miller maintained by the Department of Public Welfare, filed a "Supplemental Application for Discovery" seeking an order directing a psychiatric examination of Clarence Miller. Defense counsel recited in the application that the documents in the Department of Public Welfare folder revealed that Clarence Miller "had suffered from instability and nervousness and has frequently manifested evidence of inherent unreliability." The trial court on September 29, 1976 issued an order on the Commonwealth to show cause why the application should not be granted, but then on the same day entered an order denying the application. At that date, the Commonwealth had already been permitted to conduct its psychiatric evaluation of Goldblum. On December 2, 1976, on further application of the Commonwealth, the trial court ordered Goldblum to undergo another psychiatric examination.

At trial, defense counsel, who had not been provided with any pretrial discovery with respect to medical or mental condition of Clarence Miller, was unable to conduct a cross-examination on psychiatric history or evaluation. Miller, after being confronted by police on February 10, 1976 with the inconsistency between his account of February 9, 1976 and that of Goldblum, fainted and had to be taken to South Side Hospital. Defense counsel used that event to probe Miller's medical history:

> Question: Have you ever been hospitalized anywhere other than South Side Hospital?
>
> Answer: That's all I have ever been hospitalized, sir.

With Miller denying any medical history which would interest a cross-examiner, defense counsel abandoned the line of inquiry. As will soon appear, Miller's response to the above question was entirely perjurious and designed to prevent defense counsel from opening up Miller's medical and psychiatric history.

In June, 1978, the Commonwealth brought Miller to trial for the murder of George Wilhelm. During the trial, defense counsel for Miller called two expert witnesses, Drs. James R. Merikangas, a board-certified psychiatrist and neurologist, and Arthur J. Van Cara, a licensed psychologist. Defense counsel offered the testimony of both experts to show that the statement given by Miller to police on February 10, 1976, after having fainted and taken to South Side Hospital was involuntary and that Miller's will had been overcome by the police interrogation.

On April 28, 1978, Dr. Merikangas performed a psychiatric and neurological evaluation of Clarence Miller at the request of Miller's counsel. Dr. Merikangas testified in the Miller case that Miller had related to him that at age 6 1/2-7 years Miller had been struck on the head by a streetcar, had been hospitalized for four weeks, and had missed two months of school. Miller's skull still showed physical evidence of this prior head trauma, and a C.T. scan of Miller's head revealed a lesion near the left thalamic region. Dr. Merikangas concluded that Miller suffered from "organic brain damage."

The Commonwealth, in cross-examining Dr. Merikangas, then attempted to elicit Merikangas' view of the credibility of Miller's February 10th statement:

> Question: Do you believe that Clarence Miller had a facility for lying?
>
> Answer: I think he has a facility for not telling the truth; this may be confabulation, which is not the same

> as lying, but which sounds the same ... I will say that many of his statements may not be true when measured against objective reality. I cannot say whether he is lying. It may be that he thinks they are true when he is saying things that you and I know are false. It may be that he says things that are false, thinking they are true, and I think that that's the essence of this case here, that this man is brain damaged and much of what he does and says is involuntary, not considered and words like 'lying' and 'running away' don't apply because we are not dealing with a normal person.

The Commonwealth then showed Dr. Merikangas his written report and had him read his conclusion to the jury: "It is clear that he [Miller] has a facility for lying and I don't know how much of anything he told me is reliable and believable."

On redirect, Dr. Merikangas explained that "confabulation" is a statement "made by someone with a damaged memory system who has a false memory, and a confabulatory statement sounds like a lie." Dr. Van Cara testified that he had examined Miller at the request of Dr. Merikangas, who asked that Van Cara use psychological testing and neuropsychological testing to determine whether Miller had organic brain damage. Dr. Van Cara interviewed Miller and administered a battery of eleven standardized tests. Like Dr. Merikangas, he indicated that Miller had suffered head injury when struck by a street car at age 6 1/2-7 years, and he found on examination of Miller's skull evidence of the prior head trauma. Dr. Van Cara found Miller to have a full scale Wechsler IQ which was 20 points below average, placing him intellectually in the lower 10% of the population. The Wechsler memory test was "consistent with the pattern of organic brain damage and showed memory impairment."

The Commonwealth on cross-examination of Dr. Van Cara again attempted to establish that Miller's February 10th

statement (Goldblum the killer; Miller the innocent witness) was false. As was the case with Dr. Merikangas, the Commonwealth succeeded beyond its intentions: it elicited testimony that Miller, because of his brain damage and personality deficits, may be expected to provide accounts of events which do not correspond with reality.

On the basis of the testimony of Drs. Merikangas and Van Cara in the Miller case, the Supreme Court of Pennsylvania remanded to the trial court for an evidentiary hearing on Goldblum's claim that this after-discovered evidence warranted the granting of a new trial.

Dr. Merikangas and Dr. Van Cara testified on January 28 and 29, 1982 before the Honorable John W. O'Brien. Unlike their testimony in the Miller trial, both experts now focused on the question whether Miller's credibility as a witness was affected by brain damage. Dr. Van Cara testified to his testing of Mr. Miller in June, 1978. He repeated that Miller had informed him of a streetcar accident when he was 6 1/2-7 years old, that he had been unconscious for a period after the accident, had missed two months of school, and had headaches and blurred vision. Dr. Van Cara repeated that he had verified by examination of Miller's skull that he had suffered trauma to his head at some earlier date. He repeated that he had found brain damage:

> Mr. Miller was suffering from brain damage, for a long time since age seven, and that the brain damage was secondary to the closed head injury that occurred in the streetcar accident when he was seven years old ... [T]his brain damage had significantly colored his personality formation from that point forward because he had to begin to hide his reading deficits and learn to become somewhat devious with the world to cover his low self-esteem and neurological deficits.

Dr. Van Cara testified that people with Miller's history of brain damage and limited intelligence "make up things when their memory does not serve them well, and in his case we have a memory deficit. There are definitely memory lapses." Dr. Van Cara explained that the process of filling up "holes in his memory" was called "confabulation" and opined that Miller's tendency toward "confabulation" was at the "moderate level of severity." Dr. Van Cara said:

> So depending on the scruples he has developed throughout his life there could be elements of conscious lying, unconscious lying and confabulation, all kinds mixed in. It's hard to observe one of those kinds of distortions of truth from the other.

Dr. Van Cara testified that Miller has "difficulty communicating because of language and because of his concreteness, inability to abstract, which is also caused by brain dysfunction." He said that "brain injury subsequently caused him to become somewhat devious and so, in addition to total confabulation, that would appear to be a lie, we have the personality character[istics] that caused him to take the most expedient route at times which would be antisocial and could be literally distorted but distorting badly the truth." Dr. Van Cara testified that Miller's capacity to observe events was "affected ... by stress" and that his perceptions are "more distorted than the normal person's perceptions under stress." Dr. Van Cara said that Miller "distorts at several levels", that he distorts "in the interpretation of events occurring" and distorts "in his memory in recalling." Dr. Van Cara also testified that Miller's "capacity to remember" was "definitely impaired", and the impairment was "moderate." Dr. Van Cara summed up his conclusions as follows:

> You have the personality of where this person lies under stress. And we have a mentally handicapped person who has a brain syndrome.

> And we also have the historical aspects of the personality that would cause him to disassociate. So you have a number of different ways of distorting the events and I did not address those issues in my prior testimony [i.e., in the Miller trial].

Dr. Merikangas testified that he reviewed his examination and evaluation of Miller on April 28, 1978 and then gave his conclusions with respect to Miller's credibility. He said that Miller was a brain damaged individual and his characteristics were indicative of traumatic closed head injury at an early age. He repeated that Miller had informed him of the head injury/streetcar accident from age 6-7, that he had been hospitalized for four weeks, and that his performance in school had deteriorated after that injury. He testified that he had examined Miller's skull and found physical evidence of head trauma. Dr. Merikangas said that "[i]n my opinion, he confabulates." He said that Miller had "a deficit of memory," and that it would be "very unlikely that [Miller] could relate to me accurately anything about [what he saw]. There may be parts of it that would later be shown accurate, but you wouldn't know which was true and which was false."

Dr. Merikangas testified that Miller's capacity to "observe occurrences" was "deficient," and that his ability to remember events was "demonstrably deficient." Dr. Merikangas stated that Miller was "definitely unreliable" in his ability to "report what he has observed." Finally, Dr. Merikangas concluded that Miller does not "feel obliged to tell the truth."

(2) The Out-of-Court Declarations of Wilhelm.

(i) Via the Testimony of Clarence Miller.

During the testimony of Clarence Miller, the Commonwealth elicited from Miller testimony to the effect that

Goldblum in November, 1975 had solicited Miller to set the Fifth Avenue Inn on fire, but that Miller had refused. Miller then testified that he and one Orlofsky went to the Fifth Avenue Inn on Sunday, November 30, 1975, the day of the fire, and met with Goldblum. Again, according to Miller, Goldblum solicited him to burn the Fifth Avenue Inn. Again, according to Miller, he refused. Miller then testified that Goldblum stated: "If we [i.e., Miller and Orlofsky] didn't help him burn the place then he had to ... call [Wilhelm] and have him do it." The Commonwealth then elicited from Miller the following testimony without objection from defense counsel:

> Answer: George was telling me that Zeke [Goldblum] owed him some money [$3,500].
>
> The next day I told George that I talked to Zeke, and he said he didn't get his money yet. [George] said, 'Well, he better hurry up and pay me because I've got to have the money.'
>
> George was pretty -- well, furious, because he said every time that he would call Zeke that Zeke would always give him some hard luck story and he needed that money ...
>
> George ... said, Zeke owes him $3,500 and he needs that money real bad ...
>
> and he said he left the message down there, he said, 'Tell Mr. Goldblum this is the "torch man." If he doesn't pay me I'm going to go to the authorities.'
>
> He told me he received a hundred dollars and that was all.

The Commonwealth then asked whether "other than what you

have told us, did you have any other discussions with Mr. George Wilhelm concerning what happened on the night of the fire, November 30th." Defense counsel asked for an offer at sidebar, and the prosecutor replied:

> [T]he question is meant to elicit from the witness, did George Wilhelm make any other statements or admissions concerning his participation in the arson itself in any way, in any capacity; as to what was done or monies to be paid or anything else concerning the arson.

Defense counsel then stated: "I haven't objected to it, but it's the rankest form of hearsay and you knew this, and I'm going to use it." The Court then stated: "All right. Then there being no objection ..... ." Defense counsel interrupted, however, and asked that the Commonwealth state "whether or not he intended to say that George Wilhelm admitted that he was there, and what time he got there and how he did it?" The prosecutor replied: "As far as I know, there were no vivid details given. It's ... a clean-up question." Defense counsel then stated, "I, object. It's pure hearsay."

The prosecutor replied, "It's not hearsay." Defense counsel then stated:

> You are putting all this in as a state of mind? Are you saying that I can ask the Court to instruct the jury that it isn't offered for the -- it's to prove the truth only? I mean, that's silly. They wouldn't understand that. They never do.

There followed a sidebar discussion of the applicability of the "state of mind" exception to the Hearsay Rule. The Commonwealth argued that the statements showed "the victim's relationship to the defendant." The Court then overruled the objection. The Commonwealth then asked its "clean-up"

question:

> Question: [O]ther than what you have told us, did you have any other discussions with Mr. George Wilhelm concerning what happened on the night of the fire, November 30th?
>
> Answer: He told me that Zeke promised to give him $3,500 and he burned the place down, he lit the match because Zeke said that he was going -- for an alibi he wasn't going to be there, so he needed someone to 'light the match' for him.
>
> He was telling me Zeke never paid him; he wanted me to check on the money situation, the insurance.

(ii) Via the Testimony of William Hill.

During its case-in-chief, the Commonwealth called as a witness one William Hill. Hill testified that he had been a friend of George Wilhelm. The Commonwealth then attempted to elicit from Hill statements made by Wilhelm which connected Goldblum with the land purchase in North Carolina:

> Question: Going back then to any time prior to February 9th, do you recall in what connection George Wilhelm mentioned Zeke Goldblum, as being an attorney, a tax accountant, and in what connotation did he talk about him? What was the reason for bringing his name up?
>
> Answer: When he would speak of this land he had.
>
> Question: In North Carolina?

Answer: Yes.

Question: What did he indicate to you Zeke Goldblum had to do with the land in North Carolina?

Defense Counsel: May we know when this is?

Question: When would this have been prior to February of '76?

Answer: This would be during the campaign.

Question: So this is '75?

Answer: Yeah.

Defense counsel then requested a sidebar and objected on the basis of "pure hearsay." The Court asked the Commonwealth for an offer, and the prosecutor replied: "He's going to indicate that the defendant did render certain services and counsel advice with regard to the purchase of the land in North Carolina ... and that he was affiliated, associated with Miller and Wilhelm in that enterprise."

Defense counsel repeated his objection and stated: "Mr. Clarence Miller's repeated testimony as to what Wilhelm had said, I have preserved that objection, and I move that the last answer be stricken, and the jury ordered to disregard it, and I object to this testimony." The court then overruled the objection "on the basis that it constitutes part of the activities of the deceased concerning the purchase of the land and other inducements which were related to such acts." The testimony of Hill continued:

Answer: [H]e always told me, when he would talk about the property, 'Don't tell anybody, it's

in confidence what I'm telling you about this property deal.' That's all I know about it.

That's usually when he would bring this Zeke and Clarence--well, Zeke into the conversation then, yes.

Question: How many times do you recall that he mentioned Zeke or Zeke Goldblum or the attorney, accountant, prior to February of '76?

Answer: A few times, two, three.

In his closing argument, the prosecutor made full use of the hearsay testimony of Clarence Miller and William Hill for the truth of the matter asserted to establish Wilhelm's supposed role as the arsonist of the Fifth Avenue Inn, Goldblum's alleged participation in the North Carolina land scheme and Goldblum's supposed prior acquaintanceship with George Wilhelm.

REASONS FOR GRANTING THE WRIT

I.

THE ADMISSION OF THE OUT-OF-COURT DECLARATIONS OF THE DECEASED VICTIM WITH RESPECT TO PETITIONER'S ALLEGED INVOLVEMENT IN A LAND FRAUD SCHEME AND WITH RESPECT TO THE VICTIM'S ALLEGED PARTICIPATION IN AN ARSON VIOLATED PETITIONER'S CONSTITUTIONAL RIGHTS TO CONFRONTATION AND CROSS-EXAMINATION GUARANTEED BY THE 6TH AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION;

OR

THE DECISION OF THIS COURT IN SHEPARD V. UNITED STATES, 290 U.S. 96 (1933)(CARDOZO, J.), IS CONSTITUTIONALLY COMPELLED BY THE 6TH AMENDMENT.

This Court in 1933 decided the landmark case of Shepard v. United States, 290 U.S. 96 (1933). The defendant was charged in a prosecution brought by the United States with having murdered his wife. The trial court admitted statements of the deceased wife to the effect that "Dr. Shepard has poisoned me." The prosecutor at trial argued that this out-of-court declaration was a "dying declaration." On appeal following conviction, the United States abandoned the theory that the statement was a "dying declaration" (it was made several days before death and there was no reason to believe it was based on personal knowledge of the decedent) and substituted the theory that it showed the non-suicidal "state of mind" of the declarant wife.

This Court (per Cardozo, J.) unanimously condemned the admission of the wife's out-of-court declaration in an

opinion which is usually the principal case on the "state of mind" exception to the Hearsay Rule in American evidence casebooks. Mr. Justice Cardozo wrote:

> "What the Government put in evidence, however, was something very different. It did not use the declarations by Mrs. Shepard to prove her present thoughts and feelings, or even her thoughts and feelings in times past. It used the declarations as proof of an act committed by someone else, as evidence that she was dying of poison given by her husband ... It will not do to say that the jury might accept the declarations for any light that they cast upon the existence of a vital urge, and reject them to the extent that they charged the death to someone else. (Discrimination so subtle is a feat beyond the compass of ordinary minds.) The reverberating clang of these accusatory words would drown all weaker sounds ... when the risk of confusion is so great as to upset the balance of advantage, the evidence goes out."
>
> Id. at 104, 54 S.Ct. at 25-26
> (emphasis supplied).

There is, of course, a state of mind exception to the Hearsay Rule in the law of evidence. When properly used, an out-of-court-declaration admitted pursuant to this exception doubtless does not violate the 6th Amendment Confrontation Clause. See Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531 (1980)(traditional, well-established exceptions to the Hearsay Rule do not violate the 6th Amendment).

The state of mind exception, however, is easily abused. F.R.Evid. 803(3), which recognizes this exception, carefully

limits it. It cannot be used "to prove the fact remembered or believed ...." As the Advisory Committee comment indicates:

> The exclusion of "statements of memory or belief to prove the fact remembered or believed" is necessary to avoid the virtual destruction of the hearsay rule which would otherwise result.

Criminal prosecutors are adept at offering out-of-court statements on a "state of mind" theory when in fact the statements can have no probative value in the context of the trial except to prove "the fact remembered or believed." Once such statements are in evidence, prosecutors often forget the limited theory on which they were admitted, and treat them as evidence of the historical fact to which they would appear to point. All too frequently appellate courts have found it necessary to correct such abuses of this hearsay exception. See, e.g., People v. Huber, 131 Ill. App. 3d 163, 86 Ill. Dec. 385, 475 N.E.2d 509 (1985); Commonwealth v. Bond, 17 Mass. App. 396, 458 N.E.2d 1198 (1984); People v. Madson, 638 P.2d 18 (Colo. 1981); Kennedy v. State, 385 So.2d 1020 (Fla. App. 1980); State v. Wauneka, 560 P.2d 1377 (Utah 1977); State v. Goodrich, 97 Idaho 472, 546 P.2d 1180 (1976); People v. Ireland, 70 Cal.2d 522, 75 Cal. Rptr. 188, 450 P.2d 580 (1969); State v. Kump, 76 Wyo. 273, 301 P.2d 808 (1956); United States v. Brown, 160 U.S. App. D.C. 190, 490 F.2d 758 (1974). Doubtless there are many cases, such as this one, in which the defendant was severely prejudiced by flagrant misuse of the "state of mind" exception and the error has gone undetected and unremedied.

This Court has never decided the question whether the 6th Amendment's Confrontation Clause requires that the "state of mind" exception be confined to cases in which the state of mind being proven has some relevance and the out-of-court declaration is not in fact being used to prove some alleged historical event prejudicial to the defendant. Put in equivalent

terms, this Court has never decided whether Shepard v. United States, supra, and the limitation contained in F.R.Evid. 803(3)("... but not including a statement of memory or belief to prove the fact remembered or believed ...") are compelled by the 6th Amendment.

There is every reason to think that Shepard v. United States has constitutional underpinnings.

This Court has held that non-traditional hearsay, not within the scope of well-recognized exceptions, must be generally excluded, at least absent a showing of particularized guarantees of trustworthiness. Ohio v. Roberts, 448 U.S. at 66, 100 S.Ct. at 2539. The fact that the prosecutor at trial intoned the "state of mind" exception to the Hearsay Rule is, therefore, meaningless. What was admitted "was something very different." Shepard, supra, 290 U.S. at 104.

In Dutton v. Evans, 400 U.S. 74, 91 S.Ct. 210 (1970), this Court set forth a four-element test for determining whether an out-of-court declaration is barred by the 6th Amendment. One of those elements requires that the proponent of the out-of-court statement show, by evidence other than the statement, that the declarant had personal knowledge of the subject of the hearsay declaration. We suggest that where the trial court in a criminal case such as Shepard v. United States, supra, admits an out-of-court declaration on a "state of mind" theory where, in fact, the statement can have relevance only to prove the historical event remembered or believed, this element of Dutton v. Evans will usually be violated.

In Boliek v. Missouri, 479 U.S. 903, 107 S.Ct. 302 (1986), a trial court in Missouri had permitted the prosecutor to introduce a statement by the deceased victim in a homicide case that she was afraid defendant was going to kill her. In his closing, the prosecutor (who had shoehorned the statement into evidence on a "state of mind" theory) argued: "Jody Harless, one

of her last words was 'Ted Boliek's gonna blow my head off.' And he did it." Although this Court denied Boliek's petition for certiorari, two Justices of this Court thought the 6th Amendment implications of the prosecutor's misuse of the "state of mind" exception were clear:

> "There can be doubt, given the use made of the evidence by the State in summation, that the testimony as to the victim's statements was admitted to prove not her state of mind, but the truth of her belief that petitioner intended to kill her. Cf. F.R.Evid. 803(3)(statements of memory or belief not admissible 'to prove the fact remembered or believed.') It is precisely to avoid the possibility of such use of "state of mind" evidence that at least eight states and one federal court of appeals have precluded or sharply limited the introduction of evidence of the victim's state of mind in homicide cases. ... When evidence nominally received under a particular hearsay exception is presented for purposes other than those the exception was designed to serve, the constitutional analysis should not end with the mere semantic invocation of the rule. The challenged evidence in this case was not accompanied by any independent indicia of reliability. As the dissent below rightly pointed out, it was completely immaterial to the jury's consideration of petitioner's defense of accident. The only function served by the evidence, and the one which the prosecutor specifically emphasized in summation, was to raise an impermissible inference for the jury as to premeditation and intent on petitioner's part. Because I believe that the receipt of this evidence under these circumstances presents a serious Confrontation

Clause Issue, I would grant the petition for certiorari.

479 U.S. 903-904, 107 S.Ct. 302-303 (1986)(Marshall, J., joined by Brennan, J., dissenting from denial of certiorari).

We suggest that the time has come for this Court to define the 6th Amendment's applicability to prosecutorial misuse of the "state of mind" exception to the Hearsay Rule and to reinforce the important principles of fairness in criminal evidence written by Mr. Justice Cardozo 60 years ago.

II.

THE DENIAL OF PETITIONER'S PRETRIAL APPLICATION FOR PSYCHIATRIC EXAMINATION OF THE PROSECUTION'S ONLY EYEWITNESS COUPLED WITH THE DENIAL OF PETITIONER'S MOTION FOR A NEW TRIAL BASED ON AFTER DISCOVERED EVIDENCE SHOWING A SUBSTANTIAL MEDICAL BASIS FOR ATTACKING THE CREDIBILITY OF THAT WITNESS TOGETHER DENIED PETITIONER DUE PROCESS UNDER THE 14TH AMENDMENT OF THE U.S. CONSTITUTION.

This Court in Chambers v. Mississippi, 410 U.S. 284 (1973), was confronted with a case in which two different rules of criminal procedure or criminal evidence applied in Mississippi criminal trials had prevented the defendant from presenting exculpatory evidence. Defendant Chambers contended that he was not the murderer, but rather another person was, and that the other person had made statements in the community admitting the murder. Defense counsel in Mississippi sought first to call that other person as a witness, but the state trial judge, applying Mississippi's version of the common law

"voucher rule," refused to declare the witness "hostile" and indicated that defendant would be bound by the witness' testimony. Defense counsel, rather than putting that witness on the stand, called instead those in the community who had heard the man confess to the murder. The state trial judge refused this testimony on the ground that the Mississippi version of the "declarations against interest" exception to the Hearsay Rule did not extend to declarations against penal interest as distinguished from proprietary interest.

This Court reversed Chambers' conviction on the basis that the combined application of the two state rules of criminal procedure or criminal evidence had denied Chambers Due Process under the facts and circumstances as presented. This Court recognized in Chambers that state rules of criminal procedure, however valid in the general case, can give rise to a Due Process violation where they are mechanistically applied "to defeat the ends of justice." 410 U.S. at 302.

It is clear that the rationale of the Chambers decision is directly applicable to the facts of this case. Here there are two rules of Pennsylvania's criminal procedure involved: The first is that Pennsylvania will not order the pre-trial psychiatric examination of a prosecution witness. The second rule is that Pennsylvania will not grant a new trial based on after-discovered evidence where that evidence relates solely to the credibility of a prosecution witness, however damaging that evidence might be to the credibility of the prosecution witness.

Without regard to the general validity of either one of these features of Pennsylvania's criminal law, it is clear that the denial of Petitioner's pre-trial application for pretrial psychiatric examination of the prosecution's only eyewitness coupled with denial of the post-trial motion based on after-discovered evidence bearing heavily on the credibility of that witness has resulted in a denial of Due Process "under the facts and circumstances of this case."

It must be remembered that Due Process focuses on the "integrity of the fact-finding process," Berger v. California, 393 U.S. 314 (1969), and is not to be stymied by "mechanistic" applications of state procedural rules, however valid those rules may be in the general case.

The District Court, however, attempted to distinguish Chambers on the basis that both of the state rules involved in Chambers "implicated the defendant's constitutional rights," while "[i]n the present case, neither of the challenged state court actions interfered with petitioner's constitutional rights." Appendix at 28a. Nothing could be further from the truth. In Chambers the only "constitutional right" implicated by either Mississippi rule was the Due Process right to a fair opportunity to defend against the state's charges. That is the "constitutional right" involved here as well.[4] Just as occurred in Chambers, two features of Pennsylvania state criminal practice, working

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[4] It is unnecessary under the Chambers rationale to identify some previously-recognized constitutional right in a criminal trial which is infringed by the operation of a generally-valid state rule of procedure. The District Court's suggestion to the contrary is clearly erroneous. In any event, the District Court has not identified the constitutional right it believes was implicated by the Mississippi rules in Chambers.

Assuming arguendo that Chambers did have such a requirement, then Petitioner here has a stronger case than in Chambers because the state rules of procedure interfered with his ability to cross-examine the key prosecution witness. State rules which operate to deny a defendant access to important impeaching material for use in cross-examination of a prosecution witness have been held unconstitutional by this Court. Davis v. Alaska, 415 U.S. 308 (1974)(denial of use of juvenile criminal record in cross-examination held invalid).

jointly, made Petitioner unable to bring to the attention of the jury critical information directly bearing on the credibility of the key prosecution witness. This failure clearly affected the "integrity of the fact-finding process" to such a degree that the "mechanistic" application of these rules clearly "defeat[ed] the ends of justice." Chambers, 410 U.S. at 302.

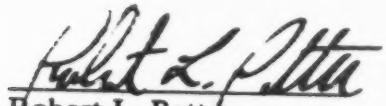
As recognized by this Court, it is entirely possible that generally-applicable and usually-valid state rules of procedure will, in the circumstances of an unusual case, deprive a defendant of his Due Process rights by denying the defendant a "fair opportunity to defend against the State's accusations." Chambers, 410 U.S. 297-298. Although this simple, obviously sound tenet of law was defined by this Court over twenty years ago, the federal district courts and courts of appeals have made little of the Chambers decision. In fact, it appears that only the Seventh Circuit has ever utilized the Chambers rationale. See, for example, Rivera v. Dept. of Corrections, 915 F.2d 280 (7th Cir. 1990)(state application of state Hearsay Rule concepts to prevent defendant from introduction of exculpatory evidence invalid under facts of case); McMorris v. Israel, 643 F.2d 458 (7th Cir. 1981); United States v. Pizarro, 717 F.2d 336 (7th Cir. 1983); Hughes v. Matthews, 576 F.2d 1250 (7th Cir. 1978).

We suggest that this Court reinforce and reaffirm those important principles of fairness in criminal trials announced over twenty years ago in Chambers and review the present case to correct a miscarriage of justice resulting from the mechanistic application of state criminal rules which undermined the "integrity of the fact-finding process" and deprived Petitioner of a "fair opportunity to defend against the State's accusations."

CONCLUSION

Petitioner Charles J. Goldblum respectfully requests for the reasons set forth above that this Court grant his petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,



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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

CHARLES J. GOLDBLUM,

Petitioner

vs.

THOMAS A. FULCOMER, Respondent
AND The Attorney General of the
Commonwealth of Pennsylvania,
Additional Respondent

Civil Action No. 89-1493
Judge Gustave Diamond/
Magistrate Sensenich

MAGISTRATE'S REPORT AND RECOMMENDATION

I. RECOMMENDATION

It is recommended that the petition be denied and that a certificate of probable cause be denied.

II. REPORT

Petitioner brings this habeas corpus action under 28 U.S.C. Section 2254 challenging his conviction of murder at No. CC7601267 before the Court of Common Pleas of Allegheny County, Pennsylvania, for which he was sentenced to life imprisonment; arson at No. CC7604826 for which he vas sentenced to ten to twenty years consecutive to his life sentence; solicitation to commit arson at No. CC7604830 for which he was sentenced to five to ten years consecutive to the other sentences; and criminal conspiracy to commit theft by deception at CC7603918 for which he received a suspended

sentence and was ordered to pay restitution to the estate of the victim in the amount of $20,000.

The petition presents two issues:

1. He claims that the denial of his pretrial application for psychiatric examination of the prosecution's only eyewitness, coupled with the denial of his motion for nev trial based on after discovered evidence providing a basis for attacking the credibility of that witness, together denied him due process under the Fourteenth Amendment to the United States Constitution.

2. He claims that the admission of the out-of-court declarations of Wilhelm that petitioner had participated in the land fraud and that Wilhelm had participated in the arson of petitioner's restaurant deprived him of his right to confront witnesses against him guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

A. Facts of Case as Presented by the Prosecution

The following facts were presented by the prosecution at petitioner's trial. George Wilhelm was the victim of the homicide. In 1971 Mr. Wilhelm injured his back at work and was permanently disabled. He received a $40,000 personal injury settlement in May or June of 1974. He wanted to use this money to purchase land in North Carolina to pursue his avocation of hunting for semiprecious rocks and gemstones.

During the summer of 1974 Mr. Wilhelm met Clarence Miller, the key prosecution witness, through Fred Orlosky, a mutual friend. Mr. Miller had no permanent employment but had been involved in various political campaigns. Mr. Orlosky. thought that because of his political connections Mr. Miller might be able to help Mr. Wilhelm purchase the land. Mr. Miller did not actually have many political connections but he promised to contact someone in Washington, D.C. Later the three men went to the Federal Building in Pittsburgh and

attempted to apply for mining prospecting permits. While they were there Mr. Miller telephoned Senator Schweiker's office in the capital and spoke with the senator's aide, Ken Manella, who told Mr. Miller what forms he needed and told him to send the completed forms to the senator's office. Mr. Miller, in order to impress Hr. Wilhelm, told him he had spoken to the senator.

Later Mr. Wilhelm decided that he would buy land in North Carolina and Mr. Miller told him that he would "use his connections" to assist him. Meanwhile, Mr. Miller and Mr. Orlosky, aware of Wilhelm's $40,000 settlement, and aware that the land he wanted to buy was reserve forest land owned by the United States which could not be purchased, decided to defraud him by representing that they were assisting him in buying the land. Ted Dedo, an acquaintance of Mr. Miller and petitioner, Mr. Goldblum, an attorney, were also contacted to assist in the scheme. Mr. Miller and petitioner had been friends since 1972. Miller, Goldblum, Orlosky and Dedo met and agreed that Dedo would impersonate Ken Manella, Senator Schweiker's aide. Wilhelm met with Dedo and Miller on several occasions in motels in both Washington D.C. and Pennsylvania and later in North Carolina. He gave Dedo various amounts of money for the land. Petitioner assisted by preparing the phoney deeds which purportedly gave Wilhelm title to the North Carolina property. During the fall of 1974 Wilhelm visited Senator Schweiker's office alone and discovered that the person he had been dealing with was not the Senator's aide Ken Manella. An FBI investigation ensued and Wilhelm gave a detailed statement that he had been tricked by "Ken Manella." Miller was also questioned, but was not suspected by Wilhelm and did not reveal the fraud. Subsequently during a meeting between Wilhelm, Miller and petitioner, petitioner convinced Wilhelm to withdraw the charge, describing it as a political hoax, and urging him to protect the Senator's reputation. Wilhelm agreed after petitioner promised that he would see to it that he would get his money back. On October 11, 1974 Wilhelm gave the FBI a notarized written statement in which he and Miller characterized their first statements as a political hoax. The investigation was terminated.

In February 1975 petitioner purchased the business of Goldstein's Restaurant, located in the uptown section of Pittsburgh, which he renamed the Fifth Avenue Inn. He initially purchased half the business for $25,000 but soon became the sole owner. His parents purchased the building in which the restaurant was located for $100,000 and leased it to the restaurant. On May 15, 1975 the insurance coverage of the building was increased from $150,000 to $200,000. The business operated at a loss until November 1975. On November 19, 1975 the contents insurance policy was increased from $30,000 to $40,000. There was also $65,000 in business interruption insurance. In November 1975, petitioner told Miller and Dedo that he was in serious financial difficulty because he owed $9,000 in federal taxes and urged them to help him set fire to the restaurant in order to collect the insurance proceeds. He showed them sterno which could be used for this purpose. Dedo and Miller refused. A week later petitioner told Miller that he was going to drill holes in the walls and pour sterno down into the foundation and that he was also going to set fire to the stairs so that the firemen could not get inside to fight the fire.

On Sunday, November 30, 1975, pursuant to petitioner's instructions, Dedo, Orlosky and Miller arrived outside the restaurant around 2:00 p.m. Petitioner and Miller went inside and petitioner was angry because, although the restaurant was closed, employees were there decorating for the holidays. He wanted them to leave. Petitioner took Miller to the second floor and showed him holes in the walls. The two then rejoined Orlosky outside and went to a nearby brothel. Later they returned to the restaurant and petitioner told them that if they would not help him burn the restaurant he would have to get Wilhelm to do it. Miller left the restaurant at 5:30 p.m. and petitioner remained there alone. The employees had already left. Petitioner arrived at a relative's home for dinner between 6:00 or 6:30 p.m. While he was there he telephoned Edith Wilson, the manager, at he home. while they were on the telephone the call was interrupted by an emergency telephone call that the restaurant was on fire. The fire alarm was received

at 6:22 p.m. and two fire companies arrived at the scene at 6:27. The fire went up through the walls and was not extinguished until 10:00 a.m. the following day. The premises were totally destroyed.

The next day Miller met petitioner at the scene of the fire and petitioner said, "I did a pretty good job didn't I?" Later in the week petitioner told Miller that he had promised Wilhelm $3,500 and complete repayment from the insurance proceeds if he would set the fire. Wilhelm later asked Miller whether petitioner had received his insurance money and told him that petitioner owed him $3,500 and that he was in urgent need of the money. Wilhelm told Miller that he had made a telephone call to petitioner's office and left a message, "Tell Mr. Goldblum this is the 'torch man'. If he doesn't pay I'm going to the authorities". Such a call was received at Goldblum's place of employment.

After the fire in November of 1975 and before February, 1976 petitioner expressed concern to Miller that Wilhelm was "bugging him" for payment of the money and was threatening to go to the authorities if he was not paid soon. Wilhelm also told Miller that he was tiring of Goldblum's promises of repayment and intended to report the arson if he was not repaid.

On Sunday, February 8, 1976, Miller and petitioner met at petitioner's place of employment in downtown Pittsburgh. The two men walked to the nearby multi-level Smithfield-Liberty parking garage and took the elevator to the roof top floor. There petitioner told Miller that he intended to beat Wilhelm up to discourage him from continually asking him for repayment. Miller agreed to lure Wilhelm to the beating for $50. Miller arranged a meeting for Monday night, February 9, at a McDonald's restaurant on Wood street in downtown Pittsburgh. Wilhelm was told the purpose of the meeting was for petitioner to pay him the money he owed. Wilhelm drove Miller to the restaurant at 7:45 p.m. Miller left the restaurant at 8:30 p.m. and met petitioner in a nearby alley shortly before

9:00. Petitioner parked his car there and put a pair of pants over the pants he was wearing. Then they went to McDonald's where they met Wilhelm. Petitioner told Wilhelm that he had his money and told him to drive him to the parking garage to pick up his car. Petitioner directed Wilhelm to the roof top floor of the garage and Wilhelm turned off the ignition. Petitioner, who was sitting in the back seat, then struck Wilhelm with a wrench and immediately began stabbing him with a grass shear blade. As he did this petitioner screamed "This will shut you up, faggot!" He continued to stab him as Wilhelm crawled back and forth across the floor of the garage, begging Miller to help him. Wilhelm managed to pull himself up at a side wall, petitioner struck him and he fell over the wall. Miller and petitioner then fled the parking garage and walked to petitioner's car. Petitioner formulated the alibi that they had left Wilhelm at McDonald's a 9:10 and threatened Miller to keep his mouth shut. Meanwhile Wilhelm had fallen only a few feet and was discovered lying on the roof of a walkway to an adjoining building, crying for help, at 9:22 p.m. When the police arrived he said, "Clarence Miller did this to me." He died at 12:12 a.m. on February 10, from, severe internal bleeding secondary to 25 stab wounds. Petitioner was arrested on February 10 after Miller implicated him in the crime under police interrogation.

On November 16, 1976, while petitioner was awaiting trial, Lieutenant Ralph Pampena of the Pittsburgh Police Homicide section received a telephone call from a confidential informant advising him there was a conspiracy in progress between a Pittsburgh attorney and Andy Kisner Bey to kill a person. Bey was contacted by the police and admitted that Goldblum had solicited him to kill Clarence Miller and had given him money but that he did not intend to commit the act. He merely intended to obtain the money from Goldblum and put him off. Bey finally told petitioner that he would find a suitable hit man and on November 19, 1976 he arranged a meeting between petitioner and Detective John Hook who was posing as the hit man. Petitioner agreed to pay Hook $2,000 to kill Miller. Later that day petitioner's bond was revoked and he

was taken into custody.

B. Petitioner's Testimony

During his trial, petitioner testified that he met Miller during the summer of 1973. (Tr. 2041). Then, in the spring of 1975, Miller started calling him, suggesting that he get into politics. (Tr. 2045). He denied that he had told Miller he was in serious financial difficulty and testified that his restaurant had been extremely profitable. (Tr. 2078). He admitted that he had met with Miller and Orlosky the day of the fire. They had come to his restaurant around 2:30 and then the three of them went to Howard Johnson's Restaurant at Chatham Center. (Tr. 2090-2091). He returned to the restaurant and Miller and Orlosky left around 3:30 or 4:00. Upon his return to the restaurant he continued an argument he had been having with some of his employees about Christmas decorations. (Tr. 2094). He did some bookkeeping work. His last employee left around 5:10 or 5:20. He stayed for about five or ten minutes to check the refrigerator and freezers. Then he locked up and left. (Tr. 2098). He drove to his cousin's home, arriving there about 5:40 or 5:45. (Tr. 2100). He called one of his employees, Edith, and tried to make up with her over the argument about the Christmas decorations. (Tr. 2102-2103). Then, while he was eating, his wife came into the room and said she had noticed on television that the restaurant was on fire. He called the fire department, which confirmed the fire. He then drove to the restaurant. He denied making the comment to Miller: "Didn't I do a good job?" (Tr. 2109). He denied that he had asked Miller to burn the building down and that he had told Miller he was going to pour sterno into the steps and into the walls of the building. (Tr. 2120).

Petitioner testified that he first met Wilhelm the day before the homicide. (Tr. 2122). In late December of 1975 or January of 1976 Miller had told him that he had gotten into a problem with Wilhelm that was coming to a head. (Tr. 2123). Miller told him that he and another guy had bilked Wilhelm out of approximately $20,000. (Tr. 2128). Miller also told him

about preparing the false affidavit for the F.B.I. (Tr. 2131-2132). After they discussed Miller's options, Miller told him he would pay Wilhelm the money he owed him. (Tr. 2138). Miller led him to believe that Wilhelm was still waiting for the real estate deal to be finalized. Miller set up a meeting for Sunday to explain the situation to Wilhelm and tell him that he would give him his money back. (Tr. 2201-2202). They agreed to meet at McDonald's Restaurant near petitioner's office. He and Miller met at his building and went to the restaurant where they met Wilhelm. During the meeting, Miller told Wilhelm that he had not been able to contact Ken Manella. That was the first petitioner had heard that name. The meeting broke up and they agreed to meet the following evening. (Tr. 2211). Petitioner testified he told Miller that he had the option of either paying Wilhelm back or retaining a criminal attorney to represent him. (Tr. 2212). He denied that Wilhelm had ever called him and complained that he owed him any money. (Tr. 2219).

On Monday, February 9, 1976, petitioner worked in his office and then taught a course at the University of Pittsburgh. He met Miller in front of Pittsburgh National Bank (Tr. 2229) and they walked to McDonald's Restaurant where they met Mr. Wilhelm. After five or ten minutes Wilhelm told them he had to move his car because it was illegally parked. (Tr. 2232). They all got into Wilhelm's car. Wilhelm was driving, Miller was in the right front seat and petitioner was in the rear. (Tr. 2235). One of the others suggested that they go to the top of the garage. Then Miller told Wilhelm that it was going to take him a few years to pay him back. Wilhelm got angry. They started shouting and yelling back and forth. (Tr. 2237). They started to fight. Wilhelm hit Miller in the face and they were grappling in the front seat. (Tr. 2237). Suddenly they broke apart, and Wilhelm opened his car door and fell to the ground, calling for help. Petitioner saw Miller get out of the car with a very bloody blade. (Tr. 2238). Then he saw Miller hitting Wilhelm. (Tr. 2240). Petitioner got out of the car and ran because he was frightened. (Tr. 2241). Miller then dragged Wilhelm to the wall and flipped him over. (Tr. 2244). He

heard a thud and he went over to the wall and saw Wilhelm lying very still on his back. He thought he was dead. (Tr. 2246). He ran for his car, followed by Miller who begged for a ride home because he was covered with blood and could not take the bus. (Tr. 2252). Miller asked him to help cover for him and he agreed to say that he had met Wilhelm at the restaurant, that Wilhelm left and he had taken Miller home. (Tr. 2252-2253).

C. Procedural History

George Wilhelm died on February 9, 1976. Petitioner Charles Goldblum was charged with murder and voluntary manslaughter in the Court of Common Pleas of Allegheny County on March 18, 1976. He was subsequently indicted for conspiracy to commit theft by deception, arson and criminal solicitation to commit arson. The conspiracy to commit theft by deception charge related to the attempted fraud on Wilhelm to sell him the North Carolina property. The arson charges related to the fire at petitioner's restaurant.

Petitioner's jury trial began on August 18, 1977 before the Honorable Donald E. Ziegler. On August 30, 1977, he was found guilty of the crimes charged, including First Degree Murder. The jury fixed the penalty on the conviction of first degree murder at life imprisonment. Attorney David Rothman represented him at trial.

Trial counsel filed an application in arrest of judgment and/or for a new trial on September 6, 1977. (Com. Ex. 1). The trial court denied petitioner's post-trial motion on September 19, 1977. Petitioner was sentenced on October 3, 1977 to life imprisonment for the first degree murder conviction. Sentence was suspended for the criminal conspiracy conviction and he was ordered to pay restitution to the estate of the victim in the amount of $20,000. He was sentenced to a total term of 15 to 30 years for the arson related convictions, to run consecutive to the life sentence. On March 7, 1978 Judge Ziegler filed an opinion in support of his order denying the post-trial motion.

(Com. Ex. 2).

Petitioner appealed his sentence of life imprisonment to the Supreme Court of Pennsylvania and filed a Notice of Appeal from his other sentences with the Superior Court of Pennsylvania. On April 11, 1978 the Superior Court certified its appeal to the Supreme Court and the appeal was consolidated.

On December 12, 1978, Charles Scarlata, appellate counsel, filed in the Supreme Court a petition for remand to consider after-discovered evidence. (Com. Ex. 3). The petition was based on his claim that after petitioner had been convicted the Commonwealth prosecuted Clarence Miller on the charge of murder of George Wilhelm. During that trial in June of 1978, defense counsel for Miller called two witnesses, Dr. Merikangas, a psychiatrist, and Dr. Van Cara, a clinical psychologist, who testified that Miller suffered from organic brain damage, resulting from a childhood accident, tending to produce a mental condition which materially bore on his capability to know, recall and recount the truth of events that he participated in. They explained that this type of brain damage produces a disorder medically known as "confabulation," a manifestation of which is the conscious and unconscious integration of fact and fiction to such an extent that the victim himself is unable to distinguish fact from fantasy. Counsel pointed out that petitioner's trial counsel had asked the trial court to order that Miller submit to a psychiatric examination prior to petitioner's trial and that request had been denied. Counsel argued that this new evidence bore on the credibility of Miller, the prosecution's main witness against petitioner. Counsel asked the Supreme Court to retain jurisdiction over the case, but to remand it to the trial court for a ruling on the Motion for a New Trial. On January 30, 1979 the Supreme Court denied the petition.

On July 12, 1979, the Supreme Court transferred jurisdiction over petitioner's appeals to the Superior Court. On May 23, 1980, the Superior Court affirmed the judgments of sentence on all counts except the conspiracy to commit theft by

deception. (Com. Ex. 4). This count was reversed for failure of the indictment to allege that petitioner had committed any acts in Allegheny County. Both the Commonwealth and petitioner petitioned the Supreme Court of Pennsylvania for allowance of appeal. The Supreme Court granted both petitions. On November 21, 1980, petitioner petitioned the Supreme Court for remand to the trial court to resolve his claim that he was entitled to a new trial because of after-discovered evidence of Miller's mental deficiencies. Attached to this petition was a copy of a Post Conviction Hearing Act (PCHA) petition filed by Clarence Miller in which be stated that he did not see petitioner stab George Wilhelm because he blacked out at the time of the crime and he could remember nothing. (Com. Ex. 5) On January 19, 1981, the Supreme court granted the petition for remand and expressly retained jurisdiction over the case. (Com. Ex. 6).

Evidentiary hearings were held on January 28 and 29, 1982 and February 16, 1982 before Judge John O'Brien of the Court of Common Pleas of Allegheny County. Both the psychiatrist and clinical psychologist who had testified at Miller's trial testified at the hearing. By order and opinion dated May 3, 1982 Judge O'Brien denied petitioner's motion (Com. Ex. 7).

Both parties filed supplemental briefs in the Supreme Court and on July 2, 1982 the Court reversed the Superior Court's order vacating the conviction for conspiracy to commit theft by deception and affirmed the judgment of sentence on all other charges. (Com. Ex. 8).

On March 7, 1986, petitioner, through attorney Robert Potter, filed a PCHA petition in the Court of Common Pleas of Allegheny County. (Com. Ex. 9). In that petition he resented eight issues, including the two constitutional issues he is raising in this habeas corpus petition. On June 23, 1986 the petition was denied without a hearing. Judge O'Brien determined that the two issues presented in the instant petition had been finally litigated. Counsel appealed to the Superior Court where he raised the same issues. (Com. Ex. 10). On February 2, 1988 the

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Superior Court affirmed the order of the PCHA court. (Com. Ex. 13). It stated that petitioner's due process arguments were merely attempts to relitigate, by advancing new legal theories, issues which had been finally litigated Petitioner filed a Petition for Allowance of Appeal raising the same issues which the Supreme Court denied by a per curium order on July 27, 1988. (Com. Ex. 12, 13).

D. Issues

1. Whether the denial of petitioner's pretrial application for psychiatric examination of the prosecution only eyewitness, coupled with the denial of his motion for new trial based on after discovered evidence providing a basis for attacking the credibility of that witness, together denied petitioner due process under the Fourteenth Amendment.

a. Petitioner's Position

Counsel initially points out that in a state criminal trial due process requires that the defendant have a "fair opportunity to defend against the State's accusations." Central to that "fair opportunity" is the "right to confront and cross examine witnesses and to call witnesses in one's own behalf." Counsel argues that a state rule of criminal procedural or line of decisional authority which interferes with meaningful cross-examination of a prosecution witness must, to survive constitutional scrutiny, be supported by a legitimate state interest which outweighs the constitutionally-based cross-examination interests of the defendant.

The main case counsel cites in support of this argument is Chambers v. Mississippi, 410 U.S. 284 (1973). The defendant Chambers was convicted of murder in a state trial and was sentenced to life imprisonment. Prior to trial, another man, Mr. McDonald, had confessed in writing to the killing, but had repudiated his confession. Thereafter, he had orally confessed the killing to at least three other people. Prior to trial Chambers' counsel filed an application to have McDonald

ordered to appear if the prosecutor failed to call him as a witness, and to have him declared a "hostile" witness so that defense counsel could call him without being bound by his testimony under Mississippi's common law "voucher rule." Under the "voucher rule," if a witness' testimony did not incriminate the defendant, the witness is not considered "hostile." The trial court ordered McDonald to appear but refused to declare him "hostile" because his testimony (which consisted of further repudiation of his earlier written confession) did not "point the finger at Chambers." Unable to conduct cross-examination and fearful of being "bound" by McDonald's testimony under the "voucher rule", counsel then sought to call the three witnesses who had heard McDonald's out-of-court declarations. The trial judge refused to permit their testimony, however, because oral confessions were inadmissible under Mississippi's common law "declarations against penal interest" exception to its hearsay rule. This is not considered a hearsay exception in Mississippi as it is in a number of other states. As a result of the operation of these two rules, the defendant's counsel was unable to bring to the jury's attention either the written or the oral confessions. The Supreme Court reversed on the basis that Chambers had been denied due process by the operation of these two rules "under the facts and circumstances of this case". The Court also noted that "in reaching this judgment, we establish no new principles of constitutional law. Nor does our holding signal any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures."

Petitioner argues that the rationale of Chambers applies to the facts of his case. He argues that Pennsylvania has two rules of criminal procedure which, together, have deprived him of due process. These are: 1) the refusal to order a psychiatric examination of the prosecution's only eyewitness prior to trial; and 2) the refusal to give him a new trial when after-discovered evidence gave him a basis to challenge the credibility of that witness without considering the weight of that evidence.

Counsel points out that Pennsylvania recognizes that a

trial court has the discretion to require a prosecution witness to submit to a psychiatric examination. However, counsel avers that he has found no Pennsylvania case granting an application by a defendant for a pretrial psychiatric examination of a prosecution witness. He cites a case in which a Common Pleas Court noted that it had that power but commented that it should only be exercised for "compelling reasons" and then only in a case involving a "sex offense". Commonwealth v. , 30 D&C 3d 50 (York Co. 1984). Counsel argues that just as it was unnecessary in Chambers to decide whether the "voucher rule," without more, had deprived the petitioner of due process, here it is not necessary to decide whether operation of the "rule" deprived petitioner of due process since his due process argument is based on the combined effect of the denial of his request for a psychiatric examination and the denial of his request for a new trial based on new evidence challenging the credibility of Clarence Miller.

Petitioner points out that in the state courts the Commonwealth argued that in Pennsylvania a new trial is not available on the ground of after-discovered evidence where the evidence relates to the credibility of a prosecution witness. He asserts that the Pennsylvania test for granting a motion for a new trial on the ground of after-discovered evidence is that a new trial will be awarded on the basis of after-discovered evidence only if the evidence in question: 1) has been discovered after the trial and could not have been obtained at or prior to the conclusion of the trial by the exercise of reasonable diligence; 2) is not merely corroborative or cumulative; 3) will not be used solely for impeaching credibility of a witness; and 4) is of such nature and character that a different verdict will likely result if a new trial is granted.

Petitioner's main stumbling block is the third element, that is that the evidence will not be used solely for impeaching the credibility of a witness. Petitioner argues that Pennsylvania does not take this element at face value. He points out that in Pennsylvania a new trial will be granted on the ground of after-discovered perjury of a prosecution witness if the witness is a

key or crucial witness. He notes that during petitioner's trial defense counsel attempted to probe Miller to determine whether he had a psychiatric or medical history which bore on his credibility. It is his position that this questioning was cut off by what he claims to be Miller's perjurious denial of any hospitalization prior to February 1976. However during his own criminal trial a year later Miller admitted that he had suffered a serious head injury at the age of 6 or 7, that the injury had resulted in his hospitalization, that he had lost consciousness, that he had suffered loss of memory with respect to the incident, and that he had not been able to return to school for two months.

Petitioner cites cases from Connecticut and New York in which courts have granted new trials based on after-discovered evidence of a prosecution witness' psychiatric condition. He does not cite any Pennsylvania or federal cases.

b. Commonwealth's Position

In its answer, the Commonwealth discusses the two Pennsylvania rules. It argues that the case law does not support petitioner's position that the trial court improperly denied his request to have Miller examined by a psychiatrist. In U.S. ex rel. Lopinson v. Marks, 409 P. Supp. 683 (U.D. Pa. 1976), aff'd 547 F.2d 1166 (3d Cir. 1977), the district court held that the refusal of the trial court to appoint a psychiatrist to examine the Commonwealth's principle witness against the prisoner (who was his accomplice) in a state trial did not constitute federal constitutional error.

The Commonwealth responds to petitioner's challenge to the denial of his motion for new trial by pointing out that the Supreme Court of Pennsylvania rejected his argument that Miller was incompetent and concluded that the doctor's testimony challenged Miller's credibility only and therefore was not a proper basis for a new trial. During petitioner's direct appeal he argued that Miller was not competent to testify and this is the issue the state courts focused on. They found that

the doctors' testimony did not support this conclusion. In the PCHA proceedings petitioner focused on his due process claims and did not claim that Miller's testimony was incompetent. He argued that the testimony "seriously impugns the credibility of Miller as the prosecution's only eyewitness, and that defense counsel, armed with that information (Miller's psychiatric condition), could have done 'serious damage' to Miller on cross-examination". The Pennsylvania state courts did not address this due process argument directly, commenting only that this issue had been raised and litigated on direct appeal.

The Commonwealth argues that petitioner has not cited any controlling case law to support his position that the two state rules combined deprived him of due process. It does not discuss the Chambers case at all but merely argues that the state courts properly ruled on each issue.

c. Analysis

While it is true that in Chambers the Supreme Court found a due process violation based on the effect of two separate rulings in a state criminal trial, the facts of Chambers are distinguishable.

Petitioner's brief suggests that during Miller's subsequent trial the Commonwealth attacked the credibility of Miller's claim that Goldblum was the killer. (p. 22, note 26). However, petitioner has not identified any such testimony in the Miller trial and the Supreme Court's opinion in Commonwealth v. Miller, 409 Pa. 457 (1980), reveals that the case against Miller was based upon his allegedly having agreed to lure Wilhelm to the site of the stabbing for $50. Even in Miller's trial, the Commonwealth claimed that it was Goldblum who had hit Wilhelm over the head with the wrench and then stabbed him with a blade of a grass shear. The Supreme Court commented that during Goldblum's trial the Commonwealth had advanced no theory and had presented no evidence which would necessarily preclude Miller's culpability.

The weakness in petitioner's due process argument is that the psychiatric and psychological evidence he wanted to present at a new trial would merely corroborate the more compelling evidence of Miller's lack of credibility which had been presented during his trial. Most telling was Miller's admission that he lied when he was nervous. (pp.995-996). Further, the jury was presented with Miller's contradictory stories which revealed that he had lied to the police. At first he denied involvement. During the trial he admitted that during the Coroner's Inquest he had testified that he did not know petitioner intended any violence toward Wilhelm when he lured him to the parking garage. (p. 956). During the trial he testified that he lured Wilhelm to the parking garage so that Goldblum could beat him up. Finally, Miller admitted that he and executed a false affidavit.

The jury was presented with clear evidence that Miller was not a credible witness. That evidence was much stronger than the proffered testimony of Dr. Merikangas and Dr. Van Cara. Therefore, the denial of petitioner's motion for a new trial on the ground of newly discovered evidence did not deprive him of due process in violation of the Fourteenth Amendment to the United States Constitution.

2. Whether the admission into evidence of the out-of-court declarations of Wilhelm that petitioner had participated in the land fraud and that Wilhelm had participated in the arson of petitioner's restaurant deprived him of his right to confront the witnesses against him guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

a. Petitioner's Position Relating to Clarence Miller's Testimony

Petitioner points out that the confrontation clause of the Sixth Amendment is applicable to state criminal trials under the due process clause of the Fourteenth Amendment. He notes that the Sixth Amendment does not require suppression of out-of-court declarations pursuant to well-founded exceptions

to the hearsay rule. He also notes that the Supreme Court has developed a two-element analysis to determine when out-of-court statements may be admitted without violating the confrontation clause of the Sixth Amendment. The first element requires that the state, before introducing hearsay evidence, first establish that the declarant is not available to testify at trial. The second element requires that the out-of-court declaration have sufficient "indicia of reliability" to justify dispensing with confrontation and cross-examination. Petitioner concedes the first requirement since the challenged statements were made by the decedent, George Wilhelm.

In Dutton v. Evans, 400 U.S. 74, 88-89 (1970), the Supreme Court applied a four-prong analysis to determine whether the out-of-court declaration had sufficient "indicia of reliability" so as not to violate the Sixth Amendment. The first step is to determine whether the out-of-court declaration "contain(s) an express assertion about past fact." If it does not, the statement itself contains a caution to the jury not to give it too much weight. The second step is to inquire whether there is an adequate basis in the evidence, other than the out-of-court declaration, to determine that the declarant had "personal knowledge" of the subject of the hearsay declaration. The third step is to determine whether it is unlikely that the declaration is based on faulty perception, recollection or recounting by the declarant. Finally, the circumstances of the declaration must be such as to make it unlikely that the declarant would have misrepresented his knowledge.

Petitioner challenges Clarence Miller's testimony that Wilhelm had made statements to him, admitting that he, Wilhelm, had participated in the arson of petitioner's restaurant. Miller testified that Wilhelm had told him that petitioner had solicited him to commit arson, that he had committed the arson, and he complained that petitioner had not paid him for doing it.

With respect to Miller's testimony, petitioner argues that Wilhelm's statements that he had participated in the arson

clearly constitute express assertions about past facts and that the first step, therefore, is not satisfied. He also argues that the second step is not satisfied because there is no independent evidence that Wilhelm acted as the arsonist and that it is extremely unlikely that he was, since only 52 minutes passed between the time Miller left petitioner at the restaurant on the day of the fire and when the fire alarm was called. Petitioner argues that according to Miller's testimony, in a period of only 52 minutes, petitioner recruited Wilhelm as an arsonist, Wilhelm accepted the assignment, came to the restaurant, started the fire, and the fire was observed and reported.

b. Commonwealth's Position Relating to Clarence Miller's Testimony

Initially the Commonwealth points out that questions regarding the admission of evidence are not subject to review by a federal habeas court unless the error is of such magnitude as to deny the petitioner fundamental fairness. Further, out-of-court statements which are not offered for their truth are not hearsay and are admissible without regard to the declarant's presence or availability at trial.

With respect to Miller's testimony, the Commonwealth argues that statements offered to prove the state of mind of the person hearing the statement are not hearsay. Intent is a state of mind and out-of-court statements which are offered to prove the hearer's intent are also not hearsay. In Dutton, supra, the Court recognized that "the hearsay rule does not prevent a witness form testifying as to what he has heard." 400 U.S. at 88. The Commonwealth asserts that Miller's challenged testimony was not offered for the truth of Wilhelm's statements that he committed the arson, but rather, it was offered to reflect both the victim's state of mind and petitioner's state of mind. The existence of petitioner's state of mind was both relevant and material to a shoving of petitioner's motive for the homicide. The statement was not introduced for the truth of the matters asserted, that is, it was not received as proof of the arson. It was introduced for the limited purpose of showing the motive

for the homicide. At trial the Commonwealth's theory was that petitioner was the arsonist and the testimony that Wilhelm called himself the "torch" when he telephoned petitioner was not for the purpose of proving that Wilhelm torched that restaurant but rather to show that petitioner, having heard this statement, had a motive for killing Wilhelm--that motive being to prevent Wilhelm from telling anyone about the arson. The Commonwealth does not specifically respond to petitioner's, argument that the four prong analysis for determining "indicia of reliability" has not been met in this case.

c. Analysis of Clarence Miller's Testimony

Petitioner argues that Miller's testimony that Wilhelm told him petitioner had promised to give him 53,500 to burn the place down and that he had done so deprived him of his right to confrontation under the Sixth and Fourteenth Amendments to the United States Constitution. However, this statement would be admissible in a federal trial as an exception to the hearsay rule, as a statement against interest. Rule 804(b) (3) of the-Federal Rules of Evidence.

Petitioner's brief asserts that all four of the steps used by the Court in Dutton, supra, to determine whether an out-of-court declaration has sufficient "indicia of reliability" to be admitted without violating the Sixth Amendment must be, satisfied to justify admission of hearsay declarations. However, the Court did not so hold. It stated "These are indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant." 400 U.S. at 89.

The parties disagree about whether Miller's testimony was admitted to prove that Wilhelm started the fire or whether it was admitted to prove one of petitioner's motives for the homicide -- Wilhelm's claim to be the torch and threatening to go to the authorities if he was not paid.

In his closing argument, discussing the arson charge, Mr.

Dixon did not refer to this testimony although he did refer to the testimony of Andrea Katz that someone had called and said "Tell Goldblum if I don't get--this is the torch calling, if I don't get my money I'm going to blow his house up." (Tr. 3340). Therefore the Commonwealth did not use this testimony as evidence that Wilhelm had actually committed the arson.

As to the second prong of Dutton -- whether there is an adequate basis in the evidence, other than the out-of-court declaration to determine that Wilhelm had "personal knowledge" of the subject of the hearsay declaration, the testimony of Ms. Matz provides some corroboration although the caller did not identify himself.

Petitioner has not argued that the third and fourth prongs of Dutton were not satisfied.

d. Petitioner's Position Relating to William Hill's Testimony

Petitioner challenges Hill's testimony that Wilhelm had told him that petitioner had provided services of some sort to Wilhelm in connection with the purchase of land in North Carolina. Petitioner argues that these statements do not comply with the first and second prongs required by Dutton, supra, to provide the "indicia of reliability." He argues that the statements relate to past facts since they indicate that Wilhelm had met petitioner in the past, had spent time in his presence, and that petitioner had provided services to Wilhelm in connection with the North Carolina land deal. Further, petitioner argues, there is no independent evidence that Wilhelm had personal knowledge of petitioner or that he had past dealings with him. Petitioner testified that he did not meet Wilhelm until the day before his death and did not know him at the time of the North Carolina land deal or at the time of the fire.

Petitioner points out that the Supreme Court of Pennsylvania held that the out-of-court declarations of Wilhelm, testified to by Hill and Miller, were accepted not for the truth

of the matters asserted, but only to show the "state of mind" of Wilhelm. Therefore, since the statements were admitted for a non-hearsay purpose their admission was proper. Petitioner argues that there is no support for the Supreme Court's holding that the out-of-court statements of Wilhelm could be admitted to show that Wilhelm and petitioner had met in the past.

e. Commonwealth's Position Relating to William Hill's Testimony

The Commonwealth asserts that Wilhelm's statements to Hill regarding petitioner's involvement in the North Carolina land deal were not offered for the truth of the matter asserted, that is that Wilhelm actually purchased property in North Carolina, but rather to show that Wilhelm initially thought he had purchased land in North Carolina, and implied that petitioner had assisted him and this was relevant to show petitioner's motive. The Commonwealth argues that it is proper to admit statements of a victim to a homicide which reflect the decedent's state of mind concerning the prior relationship between the victim and the accused when the relationship is material. Evidence that Wilhelm and Goldblum knew each other for a long time is material in light of petitioner's testimony that he had first met Wilhelm the day before the murder.

f. Analysis of the Testimony of William Hill

Hill testified that Wilhelm had mentioned the defendant's name in connection with his purchase of land in South Carolina. He did not give any detailed facts as to petitioner's role. The relevance is the fact that the statements were made, not the truth of them. Wilhelm could not have mentioned Goldblum's name to Hill if he had never heard it. Petitioner's brief, p. 17, n. 22, discusses Mr. Dixon's use of this testimony in his closing argument. Dixon argued that this evidence contradicted petitioner's testimony that he had just met Wilhelm on February 8, 1976, the day before the killing and corroborated Miller's testimony that petitioner was involved

in the land fraud. Since Hill did not testify in any detail about petitioner's alleged role in the land fraud but merely that Wilhelm had mentioned his name, the primary relevance is the making of the statement by Wilhelm not its credibility and petitioner had the opportunity to cross examine Hill as to whether the statements were made by Wilhelm. Therefore, petitioner was not deprived of his right to confrontation under the Sixth and Fourteenth Amendments to the United States Constitution.

In accordance with the Magistrates Act, 28 U.S.C. Section 636(b) (1) (a) and (C) , and Rule 4 of the Local Rules for Magistrates, the parties are allowed ten (10) days from the date of service to file objections to this report and recommendation.

ILA JEANNE SENSENICH
Chief U.S. Magistrate

Dated: August 31,1990

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

CHARLES J. GOLDBLUM,	)	
	)	
Petitioner,	)	
	)	
v.	)	Civil Action No. 89-1493
	)	
THOMAS A. FULCOMER,	)	
Respondent, and	)	
the Attorney General	)	
of the Commonwealth of	)	
Pennsylvania,	)	
	)	
Additional	)	
Respondent.	)	

OPINION

DIAMOND, J.

Petitioner's habeas corpus petition was referred to the magistrate for report and recommendation, in accordance with the Magistrates Act, 28 U.S.C. 636(b) (1), and Rules 3 and 4 of the Local Rules for Magistrates. The magistrate recommended that the petition and a certificate of probable cause be denied. After service upon the parties, objections were filed by petitioner. After de novo review of the pleadings and documents in this case, the report and recommendation and objections thereto, and pertinent authorities, we adopt the magistrate's report and recommendation as the opinion of the court. We will, however, supplement that report with some additional explanation.

Petitioner contends that the trial court's denial of his

pretrial application for psychiatric examination of Clarence Miller, coupled with the denial of his motion for a new trial, violated his right to due process under the Fourteenth Amendment. We disagree, finding that the challenged state court rulings were constitutional, taken individually or together.

The trial court's denial of petitioner's application for psychiatric examination of Clarence Miller is particularly invulnerable to constitutional attack. Pennsylvania courts have established that disposition of a party's pretrial application for psychiatric examination of a witness is largely within the discretion of the trial court. Commonwealth v. Jennings, 446 Pa. 291, 304, 285 A.2d 143, 149 (1971). A trial court's decision to refuse to order a psychiatric examination will not be disturbed unless plainly in error. United States v. Provenzano, 688 F.2d 194, 203 (3d Cir.), cert. denied, 459 U.S. 1071 (1982).

There was no plain error in this case. Prior to trial, petitioner filed a supplemental application for discovery, seeking an order directing a psychiatric examination of Clarence Miller. According to petitioner, the application stated that documents in a file maintained by the Department of Public Welfare revealed that Miller "had suffered from instability and nervousness and has frequently manifested evidence of inherent unreliability." Petitioner urges us to consider the fact that defense counsel asked Miller at trial if he had ever been hospitalized. When Miller said no, defense counsel abandoned this line of inquiry. It came out after trial that Miller had in fact been hospitalized as a child for a serious head injury.

Petitioner contends that Miller's incorrect response at trial was designed to prevent defense counsel for exposing his medical and psychiatric history. We do not accept petitioner's suggestion that Miller's untruth prevented defense counsel from bringing out Miller's psychiatric history. Defense counsel had seen documents implying that Miller had psychiatric problems and was free to probe Miller on this matter. Defense counsel did not need a pretrial psychiatric examination of Miller in order to question his mental stability.

Numerous appellate courts have upheld refusals by trial courts to order psychiatric examination of witnesses. For example, in United States v. Fountain, 840 P.2d 509 (7th Cir.), cert. denied, 109 S.Ct. 533 (1988), the United States Court of Appeals for the Seventh Circuit upheld a trial court's refusal to comply with a defendant's request for a psychiatric examination of a witness with a known history of mental problems. The court noted that the defense could have enlisted a psychiatrist to observe the witness's testimony at trial and then testify as an expert as to the witness's mental state. The court went on to state:

> the district court was entitled to be leery of both psychiatric examination of witnesses and psychiatric testimony about witnesses, because the Bury can observe for itself the witness's behavior. Criminal trials are complex enough without turning them into collateral investigations of the witnesses ....

840 P.2d at 517.

The Court of Appeals for the Sixth Circuit expressed a similar rationale in upholding a trial court's decision not to order psychiatric examination of a witness. In United States v. Ramirez, 871 F.2d 582 (6th Cir.), cert. denied, 110 S.Ct. 127 (1989), the court commented that "[i]f the doors are opened to a battle of experts testifying as to witnesses' credibility, there would be no end to the collateral consequences." 871 F.2d at 885. The court praised the wisdom of the practice of leaving determinations of credibility to triers of fact. 871 F.2d at 585. The Courts of Appeals for the Third, Ninth and Eleventh Circuits have also affirmed refusals by trial courts to order psychiatric examinations of witnesses. United States v. Provenzano, 688 F.2d 194 (3d Cir.), cert. denied, 459 U.S. 107 (1982) (holding that fact that government witnesses had not submitted to psychiatric examinations did not prevent jury from evaluating witnesses' truthfulness); United States v. Brown, 770 F.2d 768 (9th Cir.), cert. denied, 474 U.S. 1036 (1985); and United States V. Khoury, 901 F.2d 948 (11th Cir. 1990).

In the present case, the trial court's denial of petitioner's pretrial application for psychiatric examination of Clarence Miller was not an abuse of that court's discretion. Petitioner contends, however, that the ultimate impact of that denial must be judged by a subsequent refusal to grant petitioner a new trial based on after-discovered evidence of Miller's lack of credibility.

The magistrate's Report and Recommendation concluded that the jury had been presented with clear evidence that Miller was not a credible witness and that because that evidence was much stronger than the after-discovered evidence, petitioner was not deprived of due process. The magistrate did not fully address another basis for concluding that the denial of petitioner's motion for a new trial did not violate the Fourteenth Amendment. The denial of the motion for a new trial was justified because the after-discovered evidence went merely to the credibility of a witness.

The Court of Appeals for the Third Circuit has held that five requirements must generally be met before a trial court orders a new trial on the ground of after-discovered evidence. Virgin Islands v. Lima, 774 F.2d 1245, 1250 (3d Cir. 1985) (appeal from decision of a federal district court); United States v. Iannelli, 528 P.2d 1290, 1292 (3d Cir. 1976) (appeal from decision of a federal district court). One requirement is that the after-discovered evidence must not be merely cumulative or impeaching. Virgin Islands v. Lima, 774 P.2d at 1250. In reviewing decisions of the federal district court, the court of appeals has assumed without discussion that this requirement does not violate due process. See, e.g. 774 F.2d at 1245; United States v. Iannelli, 528 F.2d at 1290. The court would presumably uphold application of the same requirement by a Pennsylvania trial court. In the present case, the after-discovered evidence of Miller's psychiatric problems goes only to his credibility. The state court was not obliged to grant a new trial on the basis of this evidence. Neither the denial of petitioner's pretrial application for psychiatric examination of the government's witness nor the denial of his motion for a new

trial based on after-discovered evidence provide grounds for granting the petition for writ of habeas corpus. Petitioner contends, however, that taken together, these two actions denied him due process. Petitioner relies on Chambers v. Mississippi, 410 U.S. 284 (1973), for the proposition that it is unnecessary for us to decide whether one of these actions, without more, denied petitioner due process.

The Supreme Court held in Chambers that application of two state court rules, coupled together, denied a defendant a fair trial. 410 U.S. at 302. The Court's description of these two rules reveals that each rule implicated the defendant's constitutional rights. The Court found that the first rule "plainly interfered with [the defendant's] right to defend against the state's charges." 410 U.S. at 298. As for the second rule, its application to the defendant implicated "constitutional rights directly affecting the ascertainment of guilt." 410 U.S. at 302. In Chambers, both rules had an impact on the defendant's right to a fair trial. In the present case, neither of the challenged state court actions interfered with petitioner's constitutional rights. Petitioner's reliance on Chambers v. Mississippi is misplaced.

Accordingly, for the reasons stated above, we will deny petitioner's petition for writ of habeas corpus and his certificate of probable cause. An appropriate order will follow.

s/Gustave Diamond/s
United States District Judge

Date: Oct. 31, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

CHARLES J. GOLDBLUM,	)	
	)	
Petitioner,	)	
	)	
v.	)	Civil Action No. 89-1493
	)	
THOMAS A. FULCOMER,	)	
Respondent, and the	)	
Attorney General of the	)	
Commonwealth	)	
of Pennsylvania,	)	
	)	
Additional	)	
Respondent.	)	

ORDER OF COURT

AND NOW, this 31st day of October, 1990, for the reasons stated in the opinion filed this day, IT IS ORDERED that the petitioner's petition for writ of habeas corpus be, and the same hereby is, denied; and,

IT IS FURTHER ORDERED that a certificate of probable cause, be, and the same hereby is, denied.

s/Gustave Diamond/s
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-3815

CHARLES J. GOLDBLUM, P-2904

v.

THOMAS A. FULCOMER
CHARLES J. GOLDBLUM,

Appellant

Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil Action No. 89-01493)
District Judge: Hon. Gustave Diamond
Submitted Under Third Circuit Rule 12(6)
November 21, 1991

Before: MANSMANN, COWEN and HIGGINBOTHAM,
Circuit Judges.

JUDGMENT ORDER

After considering the contentions raised by appellant, to wit:

1. whether the admission of the out-of-court statements of the victim with respect to defendant's alleged participation in a land fraud scheme and with respect to the victim's alleged participation in an arson violated defendant's constitutional right to confrontation guaranteed by the 6th and 14th Amendments of the U.S. Constitution, and

2. whether the denial of a defense pretrial application for psychiatric examination of the prosecution's only eyewitness coupled with denial of a motion for a new trial based on after discovered evidence showing a substantial medical basis for attacking the credibility of that witness together worked a denial of due process under the 14th Amendment of the U.S. Constitution where it is undisputed that the key witness perjured himself at trial and thereby blocked defense counsel from discovering history of brain damage,

it is ADJUDGED AND ORDERED that the judgment of the district court be and is hereby AFFIRMED.

Each party to bear its own costs.

BY THE COURT

Attest:

Sally Mrvos, Clerk
Nov. 26, 1991